STATE OF MICHIGAN

COURT OF APPEALS

ROBIN E. JOHNSTON, Personal Representative of the Estate of RICHARD E. GARY, Deceased, and DONNA J. McLAIN, Personal Representative of the Estate of WILLIAM E. McLAIN, Deceased,

Plaintiffs-Appellants,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
May 21, 1999

No. 201123
Court of Claims
LC No. 96-016129 CM

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

On May 9, 1994, Richard Gary and William McLain were traveling eastbound in Gary's truck on M-43 in Van Buren County, approaching the intersection of M-43 and County Road 665 (CR 665). At that time, the intersection was controlled by a stop sign for the CR 665 traffic, while the traffic on M-43 had the right of way. The stop sign at CR 665 was preceded by two "stop ahead" signs and "rumble strips" in the pavement. As Gary's truck entered the intersection, a car traveling southbound on 665 failed to stop at the stop sign and struck Gary's truck, killing Gary and McLain.

Plaintiffs commenced a negligence action against defendant pursuant to the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), alleging that the intersection was defective because the stop sign was difficult to see and that defendant breached its duty to maintain a safe intersection by failing to install a flashing beacon at the intersection to alert drivers to stop. Plaintiffs further asserted that this breach of duty was the proximate cause of the accident.

On appeal, plaintiffs argue that the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10) was improper because there existed a genuine issue of material fact with regard to the proximate cause of the accident. We review the trial court's grant of summary

disposition de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A trial court may properly grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds could differ. *Id.*

The trial court granted defendant summary disposition on two grounds. First, the court found that there was no evidence from which a trier of fact could conclude that the intersection in question was not reasonably safe. Furthermore, relying on *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579; 546 NW2d 690 (1996), remanded (for reconsideration in light of *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996)), 455 Mich 863 (1997), the trial court found that defendant had no duty to make a reasonably safe intersection safer. Second, the court found that there was no evidence that a flashing beacon would have prevented the accident; therefore, there was no material fact with regard to the proximate cause of the accident. Because the first ground addresses defendant's duty under the highway defect exception to governmental immunity, and that issue is dispositive in this case, we need not address the issue of proximate cause.

The highway exception is a narrowly drawn exception to the generally broad grant of governmental immunity. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998). An action may not be maintained under that exception unless it is clearly within the scope of the statutory language. *Id.* at 365-366. The highway exception sets forth defendant's duty: "[e]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); MSA 3.996(102)(1).

As noted above, the trial court relied on *Wechsler* for the proposition that defendant had no duty to make a reasonably safe intersection safer. Because the parties in *Wechsler* stipulated to dismiss, *Wechsler* was never reconsidered by this Court in light of *Pick*. However, we do not find the trial court's reliance on *Wechsler* to be in conflict with *Pick*. In *Pick*, *supra* at 624, our Supreme Court held that the duty to maintain highways in reasonable repair extends to providing "traffic control devices or warning signs at, or in regard to, points of hazard affecting roadways within their jurisdiction." The Court defined "point of hazard" as "any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe." *Id.* at 623. The Court specifically noted that not all intersections "intrinsically qualify as points of hazard." *Id.* at n 15. In *Wechsler*, this Court found that a defendant does not have a duty to maintain a highway so as to make it as safe as humanly possible, but does have a duty to keep it in reasonable repair so that it is reasonably safe for travel. *Id.* at 594. Consequently, if a highway is maintained so that it is reasonably safe, no liability will result from a demonstration that it could have been made safer. *Id.*

Plaintiffs argue that they submitted sufficient evidence to create an issue of fact regarding whether the intersection was defective based on a memorandum authored by defendant's district traffic engineer, recommending the installation of an overhead flashing beacon at the intersection in question. However, there is nothing in the memorandum to indicate that defendant concluded the intersection was

unsafe or that a flashing beacon was necessary to correct a defect. Rather, it established that the decision to install the beacon evolved out of a request by local officials and a finding that the accident history of the intersection "justified" the installation. The memorandum does not serve to prove that defendant knew the intersection was not reasonably safe as it existed or that it was unsafe.

Plaintiffs also point to the deposition testimony of their highway safety and design expert and defendant's traffic engineer, and the affidavit of the driver who failed to stop at the stop sign. Again, however, all that this testimonial evidence tends to prove is that the intersection could have been made safer by the actual installation of the flashing beacon. It does not show that the intersection, as it existed, with the two stop-ahead signs, the rumble strips, and the stop sign, was not reasonably safe. Indeed, plaintiffs' highway safety and design expert acknowledged that while the Michigan Manual of Uniform Traffic Control Devices indicates that an accident history of six accidents within a two-year period may warrant installation of a flashing beacon, in the five years immediately preceding the decision to install the flashing beacon, there was not a two-year period during which there were six or more accidents correctable by such a beacon. Therefore, we find that neither the memorandum nor the testimonial evidence was sufficient to establish a genuine issue of material fact with regard to whether the intersection was reasonably safe.

We note that this case does not present facts similar to those in *Iovino v Dep't of Transportation*, 228 Mich App 125, 136; 577 NW2d 193 (1998), where this Court found that whether the defendant had breached its duty to make the intersection in question reasonably safe for vehicular travel was a question for the jury to decide. In *Iovino,* a flashing light at an intersection allowed cars to proceed through the intersection even when a train was coming. *Id.* at 128-129. This Court, in distinguishing *Wechsler*, *supra*, noted the dramatic difference between the hazards associated with intersections and those associated with railroad crossings. *Id.* at 135. Citing *Wechsler*, this Court further noted "that ordinary intersections on flat terrain are not points of special hazard for which the duty to maintain highways in a condition reasonably safe and fit for public travel imports an obligation to install extraordinary traffic-control devices beyond common stop signs or stop lights." *Id.* at 135, citing *Wechsler, supra* at 595. However, because the intersection in *Iovino* directly "funneled" cars onto railroad tracks and into the paths of oncoming trains, it was deemed to be a point of hazard under *Pick*. *Id.* at 132-135.

In this case, the intersection was marked by a stop sign, stop-ahead signs and rumble strips. Unlike the light in *Iovino* that allowed cars to pull into the intersection, the presence of the stop sign in this case clearly indicated to motorists that they should come to a stop before entering the intersection. The intersection did not "funnel" cars into the path of oncoming traffic, as was the case in *Iovino*. Accordingly, because the facts of *Iovino* are distinguishable from this case, any reliance on *Iovino* is misplaced.

Because we conclude that the trial court properly determined that there was no genuine issue of material fact with respect to the breach of duty and that the trial court properly granted defendant summary disposition on that basis, we need not reach the issue of proximate cause.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins